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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

VENSON LANE MYERS, Plaintiff, **v.** **L.E. SCRIBNER, et al.,** Defendants.	08CV0117 W WMc **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT** Hearing: October 6, 2008 Time: 9:30 a.m. Courtroom: C Judge: Hon. William McCurine, Jr. Oral Argument Not Requested

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IN THE UNITED STATES DISTRICT COURT

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Defendants submit the following Memorandum of Points and Authorities in support of their Motion to Dismiss Plaintiff's Complaint:

INTRODUCTION

Plaintiff is an inmate who is incarcerated in the Calipatria State Prison in Calipatria, California. He is proceeding in this matter *pro se* and *in forma pauperis*. He filed this lawsuit under the authority of 42 U.S.C. § 1983, alleging that Defendants violated his religious rights under various sources of law. Plaintiff seeks both damages and injunctive relief.

PLAINTIFF'S FACTUAL AND LEGAL ALLEGATIONS

The facts upon which Plaintiff bases his complaint are not entirely clear, nor are his legal claims, but as Defendants understand the Complaint with its attached documents, Plaintiff appears to allege the following: On July 7, 2007, Plaintiff and others held a meeting of the "elders" of their religious group with their sponsor. (Complaint at p. 4, Count 2.) At this meeting, the participants determined that "feeding" is a "work set forth in the gospel for [their] benefit" and that they have the right to invoke this work in their ministry. (Complaint at p. 4, Count 2.) Plaintiff goes on to allege that he submitted to prison officials a proposal to hold a food feast for the Christian community in the prison on December 8, 2007, with 800 inmates expected to attend. (Complaint at p. 5, Count 3; Complaint, Attachment entitled "Memorandum," dated September 24, 2007.) He further alleges that the proposal was denied, but that other religious groups such as Muslims were allowed to hold food feasts. (Complaint at p. 5, Count 3.) Plaintiff appears to allege that his proposal was denied on the grounds that when prison officials consulted with the prison's Christian chaplain (Defendant Charles Richey) about the proposal, he told them that whereas the tenets of other religious groups such as Jews and Muslims do provide for certain prescribed meals, the Bible does not mandate similar feasts for Christians, except for the "Lord's Supper" of bread and juice. (Complaint, Exhibit A-1.) Accordingly, prison officials agreed to schedule an Easter 2008 event that was to consist of these elements. (Complaint, Exhibit A-1; Complaint, Attachment entitled "First Level Supplemental Page," dated December 12, 2007.) Plaintiff filed this lawsuit in January 2008, asking (among other relief) that the Easter event not be canceled and that it not be reduced to bread and juice.

Plaintiff seems to assert that Defendants violated his rights under the Free Exercise Clause of the First Amendment, the Establishment Clause of the First Amendment, the Religious Land Use and Institutionalized Persons Act (RLUIPA), the Religious Freedom Restoration Act, and the Equal Protection Clause of the Fourteenth Amendment.

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GROUNDS FOR DISMISSAL

Defendants now move the Court to dismiss Plaintiff's Complaint on the following grounds:

1. Plaintiff has failed to exhaust his administrative remedies.
2. Defendants are protected by immunity under the Eleventh Amendment from liability to Plaintiff for damages.
3. Defendant Scribner cannot be held liable under a theory of *respondeat superior*.
4. Plaintiff has failed to state a claim for which relief can be granted under the First Amendment, the RLUIPA, and the Fourteenth Amendment.
5. Defendants are protected by qualified immunity from liability to Plaintiff for damages.

ARGUMENT

I.

PLAINTIFF HAS FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES.

The Court should dismiss Plaintiff's Complaint under Federal Rule of Civil Procedure 12(b), because Plaintiff failed to exhaust his administrative remedies, as required by law.

The Prison Litigation Reform Act requires inmates to exhaust administrative remedies before filing suit. The requirement states:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a). Compliance with this exhaustion requirement is mandatory. *Booth v. Churner*, 532 U.S. 731, 739 (2001).

The particular administrative requirements that must be exhausted are those that are established by the particular prison. *Jones v. Bock*, 549 U.S. 199, __, 127 S. Ct. 910, 923 (2007). In California, those administrative remedies are described in Title 15 of the California Code of Regulations. Inmates in California may "appeal any departmental decision, action, condition, or policy which they can demonstrate as having an adverse effect upon their welfare." Cal. Code Regs. tit. 15, § 3084.1(a). An inmate wishing to exhaust his or her remedies must complete four steps: (1) attempted informal resolution, (2) first formal level appeal, (3) second formal level appeal, and (4) third, or director's, level appeal. Cal. Code Regs. tit. 15, § 3084.5. The administrative process is completed, or exhausted, only after the inmate receives a decision from the Director. Cal. Dep't of Corrections Operations Manual, § 54100.11 ("Levels of Review"); *Woodford v. Ngo*, 548 U.S. 81 (2006). An inmate may not file suit in federal court until he has completed each and every step of this exhaustion process. *Vaden v. Summerhill*, 449 F.3d 1047, 1050-51 (9th Cir. 2006).

In *Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2003), the Court of Appeals held that the proper pretrial vehicle for challenging and establishing an inmate's failure to comply with this exhaustion requirement is to file "an unenumerated Rule 12(b) motion[.]" *Id.* at 1119. "In deciding a motion to dismiss for failure to exhaust nonjudicial remedies, the court may look beyond the pleadings and decide disputed issues of fact." *Id.* at 1119-20. As explained below and as reflected in the declarations filed in support of this motion, Plaintiff did not exhaust his administrative remedies with regard to the claims he raises in his Complaint, because he failed to take those claims to the second and third level of appeal.

Plaintiff took his claims through the first level of appeal, but he failed to take these claims to the second and third levels of appeal. *See* Declaration of D. Bell in Support of Defendants' Motion to Dismiss, and exhibit attached thereto; and Declaration of N. Grannis in Support of Defendants' Motion to Dismiss, and exhibit attached thereto. Because Plaintiff failed to pursue his claim through the second and third levels of appeal, as required under California law, *see* Cal. Code Regs. tit. 15, § 3084.5, he failed to exhaust his administrative remedies as required by federal law. 42 U.S.C. § 1997e(a). Accordingly, Plaintiff's Complaint should be dismissed in its entirety under Federal Rule of Civil Procedure 12(b).

II.

DEFENDANTS ARE PROTECTED BY IMMUNITY UNDER THE ELEVENTH AMENDMENT FROM LIABILITY TO PLAINTIFF FOR DAMAGES.

Plaintiff has sued Defendant Scribner in his official capacity only and has sued Defendants Builteman and Richey both in their individual and their official capacities. Plaintiff has asked for damages. To the extent that Plaintiff has sued Defendants in their official capacities, Defendants are immune to liability for damages under the Eleventh Amendment. It is well established that a state cannot be sued for damages in federal court: "The Eleventh Amendment immunizes states from private damage actions brought in federal court." *Henry v. County of Shasta*, 132 F.3d 512, 517 (9th Cir. 1997). Likewise, a suit for damages against state officials in their official capacities is barred by the Eleventh Amendment. *Regents of the University of California v. Doe*, 519 U.S. 425, 429 (1997); *Dittman v. California*, 191 F.3d 1020, 1026 (9th Cir. 1999). It makes no difference whether a defendant is individually named in his official capacity, as opposed to the State of California being named: "Thus, 'when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.'" *Regents of the Univ. of Cal.*, 519 U.S. at 429 (quoting *Ford Motor Co. v. Department of Treasury of Ind.*, 323 U.S. 459, 464 (1945)).

In the present case, Plaintiff has named Defendants individually in their official capacities and has requested monetary damages. To the extent of this request for monetary damages against Defendants in their official capacities, the Court should dismiss Plaintiff's Complaint under the Eleventh Amendment.

III.

DEFENDANT SCRIBNER CANNOT BE HELD LIABLE FOR CIVIL RIGHTS VIOLATIONS UNDER A THEORY OF *RESPONDEAT SUPERIOR.*

During the time period relevant to Plaintiff's Complaint, Defendant Scribner was the Warden of Calipatria State Prison. Plaintiff does not allege that Defendant Scribner was personally involved in any of the events that Plaintiff describes in his Complaint, or that Defendant Scribner was personally involved in any decision to deny Plaintiff's proposal for a Christian food feast. Nor does Plaintiff allege that any of the decisions or events described in his complaint were causally connected with any act of Defendant Scribner, or even that Defendant Scribner had any knowledge of those decisions or events. Plaintiff thus appears to be basing his claims against Defendant Scribner wholly on Defendant Scribner's role as Warden. That is, Plaintiff seems to be relying on a theory of *respondeat superior*.

It is well established that liability for a civil rights violation may not be based on a theory of *respondeat superior*. *Monell v. Dep't of Social Services of City of New York*, 436 U.S. 658, 692-93 (1978). "A supervisory official, such as a warden, may be liable under Section 1983 only if he was personally involved in the constitutional deprivation, or if there was a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." *Henry v. Sanchez*, 923 F. Supp. 1266, 1272 (C.D. Cal. 1996). For there to be a sufficient causal connection, the official must have actually known of a constitutional violation[.] *Barry v. Ratelle*, 985 F. Supp. 1235, 1239 (S.D. Cal. 1997). Regarding the liability of supervisory officials, the Ninth Circuit Court of Appeals recently stated:

> A supervisor is only liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.1989). Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss. *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir.1982).

Safouane v. Fleck, 226 Fed.Appx. 753, 760, 2007 WL 1031460, 4 (9th Cir. 2007) (internal quotations omitted).

Because Plaintiff has failed to establish any personal involvement by Defendant Scribner in the events and decisions set forth in Plaintiff's Complaint, any personal knowledge by Defendant Scribner of those events and decisions, or any causal connection between Defendant Scribner and those events and decisions, Plaintiff's civil rights claims against Defendant Scribner should therefore be dismissed in their entirety.

IV.

PLAINTIFF HAS FAILED TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED UNDER THE FIRST AMENDMENT, THE RLUIPA, AND THE FOURTEENTH AMENDMENT.

A. The Legal Standard for Dismissal Under Rule 12(b)(6) and Section 1983

In evaluating a complaint that has been challenged under Rule 12(b)(6), the court must accept its allegations as true and construe the facts pled in the light most favorable to the plaintiff. *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989). The court may not, however, "supply essential elements" of the plaintiff's claim. *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). Dismissal is proper if the complaint does not contain allegations that plausibly suggest entitlement to relief. *Bell Atlantic Corp. v. Twombly*, __ U.S. __, 127 S. Ct. 1955, 1966 (2007). Dismissal is also proper if a complaint is vague, conclusory and does not set forth any material facts in support of the allegation. *North Star Int'l v. Arizona Corp. Comm'n*, 720 F.2d 578, 583 (9th Cir. 1983).

To state a claim under 42 U.S.C. § 1983, a plaintiff must plead sufficient facts to show (1) that a person acting under color of state law engaged in the conduct at issue; and (2) that the conduct deprived the plaintiff of some right, privilege, or immunity protected by the Constitution or laws of the United States. *See* 42 U.S.C. § 1983; *Parratt v. Taylor*, 451 U.S. 527, 535 (1981); *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc).

In this case, as discussed below, Plaintiff's Complaint fails to state any cognizable claim for relief under the Free Exercise Clause or the Establishment Clause of the First Amendment, the RLUIPA, or the Equal Protection Clause of the Fourteenth Amendment. Accordingly, this Court should dismiss the Complaint.

B. The Free Exercise Clause of the First Amendment

Plaintiff appears to assert that Defendants violated his rights under the Free Exercise Clause of the First Amendment. To implicate the Free Exercise Clause, the challenged restriction by prison officials must burden an inmate's belief that is both sincerely held and rooted in religious belief. *Shakur v. Schriro*, 514 F.3d 878, 884-85 (9th Cir. 2008). It is well-established that prison regulations that impinge on an inmate's constitutional rights will be upheld as valid if they are reasonably related to legitimate penological interests. *Turner v. Safley*, 482 U.S. 78, 89 (1987); *Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995). In evaluating the reasonableness of the challenged prison restriction, a court will consider the following four factors:

(1) whether the governmental objective underlying the restriction is legitimate and neutral, and whether the restriction is rationally related to that objective;

(2) whether alternative means of exercising the right remain available to the inmate;

(3) the impact that an accommodation of the asserted right would have on guards, other inmates, and the allocation of prison resources; and

(4) the availability of ready alternatives to the challenged restriction.

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Turner v. Safley, 482 U.S. at 89-90; *Shakur v. Schriro*, 514 F.3d at 884; *Bradley v. Hall*, 64 F.3d at 1279-80. Under these standards for the evaluation of a First Amendment free exercise claim, Plaintiff's claim must fail.

As an initial matter, it must be noted that Defendants do not address here the issue of whether Plaintiff's claimed belief is "sincerely held" and "rooted in religious belief." *Shakur v. Schriro*, 514 F.3d at 884-85. That issue is laden with the necessity of factual inquiry and therefore does not lend itself well to disposition at this stage of this litigation, despite any apparent concerns. *See*, *e.g.*, *Theriault v. Carlson*, 495 F.2d 390 (5th Cir. 1974). Rather, Defendants contend that even if it is assumed for the sake of argument that Plaintiff's claimed belief is sincerely held and rooted in religious belief, his Free Exercise claim must fail, because his Complaint and its attachments establish that any restrictions imposed by Defendants survive the *Turner v. Safley* four-factor inquiry. *See Turner v. Safley*, 482 U.S. at 89-90.

1. The Objective Underlying the Prison's Restriction Was Legitimate and Neutral, and the Restriction Was Rationally Related to That Objective.

When prison officials declined to schedule Plaintiff's requested food feast, Plaintiff appealed the decision to the first level of review within the prison's appeal system. Plaintiff attached the first level decision to his Complaint. That document states that the decision was based on the fact that "a special religious feast with approximately 800 inmate participants from Facility A would jeopardize the safety and security of inmates and staff." (Complaint, Attachment entitled "First Level Supplemental Page," dated December 12, 2007). The objective of declining to schedule the requested feast was, thus, to avoid a situation that would jeopardize safety and security. Such an objective is not only legitimate, but is, indeed, compelling, according to the Ninth Circuit Court of Appeals. *See Greene v. Solano County Jail*, 513 F.3d 982, 988 (9th Cir. 2008) (prison security is a compelling interest). That objective is also neutral, because the concern for the safety and security of inmates and staff is present with regard to any large gathering within the prison. The first level decision gives no indication that the safety and security concern was particular to Plaintiff's specific group or that it was limited to his requested gathering. Finally, the decision to decline to schedule

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an event that constituted a threat to the safety and security of inmates and staff was, as a matter of logic, rationally related to the objective of avoiding such gatherings.

2. Alternative Means of Exercising the Right Remained Available to Plaintiff.

The first level appeal decision that is attached to Plaintiff's Complaint states that in lieu of the food feast requested by Plaintiff, "a special religious service may be conducted and scheduled by the Protestant Chaplain, by keeping with capacity limitations." (Complaint, Attachment entitled "First Level Supplemental Page," dated December 12, 2007.) The document also indicates that the decision was guided by the Religious Review Committee's determination that according to Protestant beliefs and practices, the food items that have religious significance for Christians are the bread and juice that are traditionally served as "the Lord's Supper." (Complaint, Attachment entitled "First Level Supplemental Page," dated December 12, 2007.) The alternative religious service was to include these items. The decision's guidance by a consideration of Christian principles is reflected in another document that is attached to Plaintiff's Complaint, labeled "Exhibit A-1." This document sets forth the rationale of the prison's Christian Chaplain (Defendant Richey), upon which the initial decision to decline Plaintiff's request was based. In this document, Chaplain Richey stated:

> I discussed the Christian Feast idea w/A/W Builteman. He had checked the Federal Prisons Religious Manual, there is no mention of religious feasts for Christian Faith. Jews and Muslims do have religious prescribed meals. I responded to him that while the Bible does not mention food for Christians, the Bible does reference the Lord's Supper – a Christian Passover. He agreed to that logic. So we will prepare an Easter event."

(Complaint, Exhibit A-1.)

Prison officials accommodated Plaintiff's desire to have a food-centered Christian celebration by arranging for an Easter service in which bread and juice was to be served. This accommodation plainly gave Plaintiff an alternative means of exercising the right he claims was infringed upon. In this regard, it should be noted that in presenting his proposal for a food feast, Plaintiff did not specify the particular menu he was requesting. Regulation 3053 of the California Code of Regulations provides that religious groups within the prisons may schedule special religious services in which special ceremonial foods will be served. Under Regulation 3053(b)(2), the religious group's request for religious ceremonial foods at a special religious service must include the proposed menu. Plaintiff's request did not include a proposed menu. Prison officials accommodated Plaintiff's claimed right to hold a food-centered religious service by giving him the alternative of an Easter service in which bread and juice would be served. Such a service was clearly a reasonable alternative, particularly given Plaintiff's vague request.

3. The Impact that Plaintiff's Requested Service with 800 Attendees Would Have Had on Guards, Other Inmates, and the Allocation of Prison Resources Would Have Been Significant.

In Plaintiff's proposal to schedule a Christian food feast, he estimated that 800 inmates would attend. (Complaint, Attachment entitled "Memorandum," dated September 24, 2007.) Reason dictates that an event in which 800 prison inmates are gathered in one location will significantly increase the potential for security breaches and will pose a potential threat to the safety of both inmates and staff. Such a large gathering would necessitate oversight by additional guards and other prison personnel, particularly with the added element of the service of food to the 800 inmates. It follows that devoting additional personnel to oversee and serve this gathering would necessarily pull those personnel from assignments and duties elsewhere in the prison facilities, thus increasing the potential for mishaps in those other locations. Placing a capacity limitation on Plaintiff's proposed religious service was a reasonable way to address the safety and security concerns that would inherently accompany a gathering of 800 inmates, while still accommodating Plaintiff's right to exercise his religion.

4. No Ready Alternatives Were Available to Prison Officials.

Given the prison officials' safety and security concerns stated above, their only alternative would have been to hire additional guards and personnel to monitor and serve at Plaintiff's requested religious service. This was not a viable alternative, particularly considering the well-established budget constraints under which the state's prison system must operate. Because no ready alternatives were available to them, it was reasonable for them to re-schedule the service with capacity limitations and to offer the more limited menu that they were advised was consistent with Christian principles.

5. Plaintiff's Free Exercise Rights Were Not Violated.

As demonstrated above, Plaintiff's Complaint and its attachments establish that the limited restrictions that were placed on Plaintiff's exercise of his religious beliefs were reasonably related to a legitimate penological interest. Those restrictions should therefore be upheld, and Plaintiff's free exercise claim must fail. *Turner v. Safley*, 482 U.S. 78, 89 (1987).

C. The Establishment Clause of the First Amendment

Plaintiff appears to assert that the Department of Corrections violated the Establishment Clause "by the establishing of Muslim interest over Christians." (Complaint at p. 5, Count 3.) Plaintiff alleges no facts to support such a claim.

In order to survive an Establishment Clause challenge, the challenged governmental action must satisfy the three-part test established by the U.S. Supreme Court in *Lemon v. Kurtzman,* 403 U.S. 602 (1971). That three-part test provides as follows:

(1) The governmental action at issue must have a secular purpose;

(2) Its primary effect must be one that neither advances nor inhibits religion; and

(3) It must not foster an excessive government entanglement with religion.

Id. at 612-13; *accord*, *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 859-66 (2005) (reaffirming vitality of the *Lemon* test); *Card v. City of Everett*, 520 F.3d 1009, 1013 (9th Cir. 2008).

Because Plaintiff has not pleaded facts to support his vague claim of an Establishment Clause violation, it is impossible to conduct an analysis of the claim under the *Lemon* test. Plaintiff has alleged no facts whatsoever to show that the Department of Corrections gave Muslim inmates more favorable treatment than it gave Christian inmates, or indeed to show that the Department took any actions that affected Muslim inmates in any way.[1] In order to state a claim that Defendants or the Department of Corrections unconstitutionally established the interests of Muslims over those of Christians, Plaintiff must, at the very least, allege *something* about Muslims – some facts to show

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1. One of the attachments to Plaintiff's Complaint is a document that appears to be an attachment to Plaintiff's October 10, 2007 appeal of the decision not to schedule the food feast. In this document, Plaintiff alleges that on October 13, 2007, a service was canceled by Defendant Richey "in lieu of Ramadan consideration[.]" But Plaintiff was not making an Establishment Clause claim in that document, because he goes on to allege there that the reason the service was canceled was retaliation against him for filing his appeal on October 10, 2007, about the food feast. The first level decision on Plaintiff's food feast appeal states that the October 13, 2007 service was postponed in order to afford the Muslim community to conduct a closing ceremony for the month of Ramadan. Plaintiff has not mentioned the cancellation of the October 13, 2007 service in the present case.

that Defendants or the Department did something to favor Muslims. Plaintiff has not alleged anything of this nature about Muslims. The court may not supply essential elements of Plaintiff's claim. *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). Plaintiff's Establishment Clause claim must fail.

D. The RLUIPA

Plaintiff claims that Defendants violated the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1, *et seq*., and the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb, *et seq*. In *City of Boerne v. Flores,* 521 U.S. 507, 515-16 (1997), the U.S. Supreme Court invalidated the RFRA as applied to the states, because it "exceeded Congress' remedial powers under the Fourteenth Amendment." *City of Boerne,* 521 U.S. at 532-36. Accordingly, Defendants will address Plaintiff's RLUIPA claim only.[2/]

The RLUIPA prohibits the government from imposing "'a substantial burden on the religious exercise of a person residing in or confined to an institution,' unless the burden furthers 'a compelling governmental interest,' and does so by 'the least restrictive means.'" *Cutter v. Wilkinson*, 544 U.S. 709, 712 (2005) (quoting 42 U.S.C. § 2000cc-1(a)). The Ninth Circuit Court of Appeals has explained that a "substantial burden" on "religious exercise" must "'impose a significantly great restriction or onus upon such exercise.'" *Warsoldier v. Woodford*, 418 F.3d 989, 995 (9th Cir. 2005) (citation omitted). A "substantial burden" also occurs "'where the state . . . denies [an important benefit] because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Id.* (quoting *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 717-18 (1981)).

Under the RLUIPA, a plaintiff bears the responsibility of making a *prima facie* showing that the challenged conduct constitutes a substantial burden on the exercise of his religious beliefs. *Warsoldier v. Woodford*, 418 F.3d at 994. The defendant then bears the burden of showing that any substantial burden on the plaintiff's exercise of his religious beliefs is both "in furtherance of a compelling governmental interest" and the "least restrictive means of furthering that compelling

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2. In any event, the pertinent language of the RLUIPA tracks that of the RFRA.

governmental interest." *Id.* at 995. "Prison security is a compelling governmental interest." *Greene v. Solano County Jail*, 513 F.3d 982, 988 (9th Cir. 2008).

In this case, it is questionable whether Plaintiff has made a *prima facie* showing of a substantial burden on the exercise of his religious beliefs. First, it is unclear what specific religious practice Plaintiff is claiming was burdened. He requested a religious service on a particular date (December 8, 2007) involving food, but he did not specify the type of food to be served. He was permitted a service on another date (Easter, 2008) involving the service of the only kind of food with religious significance for Christians mentioned in the Bible (the bread and juice of the Lord's Supper), according to the prison's Christian chaplain. Plaintiff does not allege that the Easter date was religiously inappropriate, nor does he allege that the proposed bread and juice is contrary to his religious beliefs. If the alternative Easter Lord's Supper service is a substantial burden on Plaintiff's religious practice, he has not said *how* it is a burden. Nor does Plaintiff allege any facts to show that officials placed him in the position of feeling pressured to violate his beliefs. *Id.*; *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. at 717-18. Plaintiff's vague allegation that he was denied some unspecified type of food feast does not seem to succeed in making a *prima facie* showing that Plaintiff's religious exercise was substantially burdened.

But even if it assumed for the sake of argument that Plaintiff has made his required *prima facie* showing that Defendants imposed a substantial burden on his religious exercise, Plaintiff's Complaint and its attachments nevertheless establish that Defendants did so in order to achieve a compelling governmental interest and that they used the least restrictive means of doing so.

As discussed above under the "Free Exercise" discussion (Heading IV-B), the food feast service that Plaintiff proposed for December 8, 2007, was declined on the grounds that, with 800 inmates expected to attend, the gathering would give rise to concerns about the safety and security of both inmates and staff. Plaintiff's proposed service would require the dedication of additional guards and other personnel – particularly because it involved the service of food to the 800 expected attendees – thus depleting staff available to maintain security in other facilities of the prison. As previously noted, the Ninth Circuit Court of Appeals deems prison security to be a compelling governmental interest. *Greene v. Solano County Jail*, 513 F.3d 982, 988 (9th Cir. 2008). As also previously discussed, the option of bolstering security by devoting additional staff to be on duty for Plaintiff's proposed service was not a viable option, given the Department's budget constraints. The least restrictive means of accommodating Plaintiff's request while addressing security concerns, but without requiring additional staff was to permit a service that would have capacity limitations but that would provide for religious food that was consistent with Christian beliefs.

The alternative Easter Lord's Supper service that was offered to Plaintiff met this requirement. Moreover, Plaintiff has failed to state how the offered alternative restricted his religious exercise. Plaintiff's RLUIPA claim must fail.

E. The Equal Protection Clause of the Fourteenth Amendment

Plaintiff seems to claim that his rights under the Equal Protection Clause of the Fourteenth Amendment were violated. Again, he fails to state facts to support this claim.

The Fourteenth Amendment's Equal Protection Clause guarantees that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). The U.S. Supreme Court has made clear that in order to show a violation of the Equal Protection Clause, a plaintiff must provide proof of a "discriminatory intent or purpose." *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188, 194-195 (2003) (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977)). The Court has further explained that the notion of "discriminatory purpose" "implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (citing *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979)).

In this case, Plaintiff has failed to allege facts or otherwise show that he or his religious group was ever treated any differently than any other person or group. Moreover, Plaintiff has failed to allege any facts to show that Defendants harbored any kind of discriminatory intent toward him or his group, *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188, 194-195 (2003), or that Defendants took any course of action against Plaintiff *because of* the adverse

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effects that action would have on some identifiable group. *Miller v. Johnson*, 515 U.S. 900, 916 (1995) Plaintiff has simply failed to state an equal protection claim.

V.

DEFENDANTS ARE PROTECTED BY QUALIFIED IMMUNITY FROM LIABILITY TO PLAINTIFF FOR DAMAGES.

Because Plaintiff has failed to adequately allege a constitutional violation under the First or Fourteenth Amendments, as discussed above, Defendants are protected by qualified immunity from damages in their individual capacities. Qualified immunity "'shield[s] [government agents] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "The general rule of qualified immunity is intended to provide government officials with the ability to 'reasonably anticipate when their conduct may give rise to liability for damages.'" *Anderson v. Creighton*, 483 U.S. 635, 646 (1987) (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)). A ruling on a qualified immunity claim should be made "at the earliest possible stage in litigation" "so that the costs and expenses of trial are avoided where the defense is dispositive." *Saucier v. Katz*, 533 U.S. 194, 200 (2001). Under the qualified immunity analysis set forth by the U.S. Supreme Court in *Saucier*, Defendants in the present case are immune from liability.

Under *Saucier*, the trial court must first ask whether a constitutional right would have been violated under the facts alleged. 533 U.S. at 201. "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Id.* Second, assuming a constitutional violation is alleged, the question remains whether the right was clearly established under the particular circumstances faced by the defendants. *Id.*

When the *Saucier* analysis is applied to this case, it is clear that Defendants are entitled to qualified immunity. As previously discussed, Plaintiff failed to state a claim under the Free Exercise Clause of the First Amendment, because the facts, as pleaded, do not establish that prison officials took any action with regard to Plaintiff that was not reasonably related to a legitimate penalogical interest. *See supra* under Heading IV-B. Likewise, as previously discussed, Plaintiff failed to state a claim under the Establishment Clause of the First Amendment, because he did not plead enough facts about Muslims. Indeed, he did not plead enough facts to allow his claim to be analyzed under the *Lemon* test. *See supra* under Heading IV-C. Plaintiff also failed to state a claim under the RLUIPA, because the facts, as pleaded, do not make a *prima facie* showing that Defendants imposed a substantial burden on Plaintiff's exercise of his religious belief. Moreover, even if Plaintiff had made such a showing, his Complaint and its attachments establish that Defendants took the action they took in order to achieve a compelling interest and that they did so by the least restrictive means. *See supra* under Heading IV-D. Finally, Plaintiff failed to state a claim under the Free Exercise Clause of the Fourteenth Amendment, because he failed to plead any facts to show a difference in the treatment he received, as compared with any other person or group, or that Defendants took any action against him with a discriminatory purpose. *See supra* under Heading IV-E.

Because Plaintiff's allegations do not, on their face, describe any violation of the First or Fourteenth Amendments, the inquiry ends, and it is not necessary to analyze whether any constitutional right of Plaintiff was clearly established and known to Defendants. Defendants are thus entitled to qualified immunity from any damages allegedly suffered by Plaintiff.

But even if the second part of the *Saucier* inquiry were undertaken, the conclusion would still be that Defendants are protected by qualified immunity. Under the second part of the *Saucier* analysis, the Court must ask whether Defendants violated clearly established statutory or constitutional rights of which a reasonable person would have known. That is, the Court must ask whether the right that Plaintiff asserts was clearly established under the particular circumstances faced by Defendants. Although, generally, the right to exercise one's religious beliefs is clearly established, the particular right that Plaintiff claims was violated is not as clear. Plaintiff claims that his right to exercise his beliefs as a Christian was violated, but he never says specifically what he was restricted from doing. Defendants acted on the guidance of the Christian chaplain, who advised them concerning the only food with religious significance for Christians that is mentioned in the Bible. Defendants offered Plaintiff the opportunity to hold a service in which such food would be served. If Plaintiff is claiming that he should have been allowed to engage in an act of Christian significance involving some other unspecified food, it is an act that a reasonable person would not have known about. Defendants acted reasonably under the circumstances. They are protected by qualified immunity.

CONCLUSION

For all of the foregoing reasons, the Court should dismiss Plaintiff's Complaint.

Dated: August 21, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE BY U.S. MAIL

Case Name: **Myers, Venson Lane v. Scribner, et al.**

Case No.: **08CV0117 W (WMc)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 21, 2008, I served the following documents:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Manual Notice List

Venson Lane Myers
CDCR # C-29600
Calipatria State Prison
P. O. Box 5005
7018 Blair Road
Calipatria, CA 92233-5005
In Pro Per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 21, 2008, at San Diego, California.

J. Yost — Declarant

J. Yost — Signature

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